83-412

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROESCH, INC., and MARKETING DIVISION, INC.,
Petitioners

vs.

STAR COOLER CORP., HUSSMANN REFRIGERATION, INC.,
and TOUR ICE MIDWEST, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Do complaints by a manufacturer's distributors to the manufacturer regarding a competing distributor's pricing policies, together with the termination of the distributor relationship between the manufacturer and the subject distributor in response to the other distributors' complaints shortly after the manufacturer's warning to adhere to suggested resale prices, permit an inference of a combination, contract or conspiracy among the complaining distributors and the manufacturer, in violation of Section 1 of the Sherman Act, 15 U.S.C. §1?

2. Is evidence of prior contracts to fix resale prices between a manufacturer and its distributors admissable to show the intent, ability and general practice of the manufacturer and its distributors to fix prices?

STATEMENT PURSUANT TO SUPREME COURT RULES 21 AND 28.1

The parties to the proceedings in the court are those listed in the caption. Marketing Division, Inc. is a subsidiary of Roesch, Inc.

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OPINIONS BELOW

The following opinions of the Eighth Circuit Court of Appeals and of the District Court for the Eastern District of Missouri are set forth in the appendices in chronological order:

The memorandum opinion of the district court granting Star Cooler's motion for a direct verdict is officially reported at 514 F. Supp. 890 (E.D. Mo. 1981), and is set forth in Appendix A.

The panel opinion of the Court of Appeals affirming the District Court's grant of Star Cooler's motion for a directed verdict is officially reported at 671 F.2d 1168 (8th Cir. 1982) and is set forth in Appendix B.

The order of the Court of Appeals granting a rehearing *en banc* is not officially reported and is set forth in Appendix C.

The affirming and dissenting opinions of the Court of Appeals *en banc* are not officially reported and are set forth in Appendix D.

The order granting a stay of mandate pending application for certiorari is not officially reported and is set forth in Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit *en banc* was entered on July 12, 1983. Petitioner filed a motion for stay of mandate pending application for certiorari. The motion was granted on August 12, 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND AND STATUTES INVOLVED

(a) Section 1 of the Sherman Act, 15 U.S.C. §1, which states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(b) Rule 401 of the Federal Rules of Evidence, which provides:

> Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

(c) Rule 402 of the Federal Rules of Evidence, which provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

STATEMENT OF THE CASE

This case presents the Court with an opportunity to resolve the conflict and confusion among the Courts of Appeals as to the requisite elements of liability and the sufficiency and methods of proof in Sherman Act §1 suits by a terminated distributor or dealer who alleges that his termination was the result of a price-fixing combination, conspiracy or contract among the manufacturer(s) and the remaining distributors or dealers in restraint of trade.

The Fourth and Seventh Circuits permit a jury to infer an illegal price-fixing conspiracy from evidence showing:

(1) price-related complaints about the terminated distributor's conduct from other distributors to the manufacturer;

(2) the manufacturer's concern about the issues raised by the complaints; and

(3) termination of the distributor after the complaints were received by the manufacturer.

The Second, Third and Ninth Circuits have all imposed additional requirements which the plaintiff must satisfy in order to make out a prima facie showing of a conspiracy. These requirements take the form of limitations on the type of evidence a plaintiff may use to demonstrate a conspiracy, stringent demands as to the quantity of proof necessary to take the case to the jury, and elements to be proved in addition to the three required by the Fourth and Seventh Circuits.

In this case, the Eighth Circuit, recognizing the importance of the question and responding to the conflict between two Eighth Circuit panels which had reached irreconcilable decisions on the issue, considered the question *en banc*. Given the numerous conflicting precedents of the Courts of Appeals, it is unsurprising that the Eighth Circuit was equally divided in affirming the District Court's grant of a directed verdict in favor of the Defendants-Respondents.

In view of this deadlock, Petitioners Roesch, Inc. and Marketing Division, Inc. respectfully request that certiorari be granted. This case raises the same issues as *Spray-Rite v. Monsanto*, 684 F.2d 1226 (7th Cir. 1982), *cert. granted* ____ U.S. ____, 103 S. Ct. 1249, 75 L.Ed. 2d 479 (1983), and would be an appropriate companion to that case.

Furthermore, this case raises the important evidentiary question of the admissibility of prior written contracts between the manufacturer and its distributors fixing resale prices to show the defendants' intent and ability to fix prices. Moreover, this case presents the Court with an opportunity to rule on the proper standard to be applied by the district and appellate courts in ruling on motions for a directed verdict, so as not to usurp the fact-finding function of the jury in Sherman Act §1 cases.

A. The Proof At Trial

Petitioners Roesch, Inc. and Marketing Division, Inc., a wholly-owned subsidiary of Roesch (collectively referred to

herein as "Roesch"), engage in the direct market sale of ice related products. Since early 1976, Roesch has sold a line of ice merchandisers, including the "Ice Maid", which Roesch manufactures itself.

Star Cooler Corporation ("Star"), the defendant below, is a subsidiary of Hussmann Refrigerator Co. Star manufactures and sells to both distributors and retailers a variety of ice related products, including ice merchandisers. Roesch offered to prove that Star has the largest single share of the ice merchandiser market, approximately 40% or better. (TR. 367, 368, PX 30) (TR refers to pages of trial transcript. PX refers to Plaintiff's Exhibits. TR-A refers to the transcript of Robert Voges' testimony on direct examination, which continues at page 278 of the main transcript.)

Hussmann Refrigeration, Inc. (Hussmann) is also a subsidiary of Hussmann Refrigerator Co. (TR. 453). Hussmann acts as a stocking distributor of Star products and competes with Star for the sale of ice merchandisers. (*Id.*) Tour Ice Midwest, Inc. (Tour Ice) is also a distributor of Star products, including ice merchandisers. (TR. 423).

In March of 1980, representatives of Roesch and Star reached an agreement whereby Roesch would sell Star ice merchandisers on a "private label" basis. Star would make a few cosmetic changes to a Star ice merchandiser, attach a Roesch decal, and ship the product directly to Roesch's customer using a bill of lading with Roesch's name affixed. Roesch would then invoice the customer and make its own collections. (TR. 22).

On March 13, 1980, Star supplied Roesch with a price list which specified the following prices: (1) "D-15" — list less 50%, less 15%, (2) "private label" price — D-15 less 14%, and (3) private label less 4%. The latter price was the price at which Roesch purchased. (TR. 39, PX 3 and 5). Roesch received the top discount because of its enhanced capabilities for selling a large volume of ice equipment and its past success in the field.

(TR. 219). Tour Ice received the same discount that Roesch received. As was the case with Roesch, Tour Ice was not required to service or maintain an inventory of Star products. (TR. 24, 442).

Star's representative explained to Roesch's salespeople that the D-15 price was the manufacturer's recommended resale price. (TR. 40). David Smith, president of Star, admitted that Star generally sold at the D-15 price in order to support the Star "stocking" distributors. (TR. 410-11).

On September 25, 1979, Star had issued a memorandum to all of its stocking distributors regarding resale prices. (PX 31, TR. 393). Star "recommended" that its distributors charge their customers the D-15 price on ice merchandisers. (*Id.*). In addition, Star had a history of supporting, or fixing, resale prices: Roesch made an offer of proof of numerous contracts between Star and its distributors which established the distributor as an "exclusive" distributor and which guaranteed that Star would not sell to anyone within the exclusive distributor's territory below a specified price. (PX 32-37, TR. 377, 458). For example, a "Pricing Agreement" dated February 24, 1975 between Star and a distributor provided in part: "Nice Ice Manufacturing Company agrees not to sell below the Distributor Price to anyone without written authorization from Thomas Howat of Star Cooler or his successor." (PX 32). The trial court refused to admit any of the above contracts into evidence, at first on the basis of the Fair Trade Proviso to Section 1 of the Sherman Act, which proviso was repealed in 1975 (TR. 377), and subsequently, when counsel for Roesch brought the repeal of this proviso to the court's attention, the offer of proof was again rejected, without explanation. (TR. 457-58).

Roesch enjoyed substantial success with the Star manufactured products, selling approximately $27,000 of those goods in the three week period before the termination. (PX 22, TR. 54-55, 60 TR-A 32-33). Roesch chose to charge its customers at a price below the recommended D-15 price. (TR-A 30, 31, TR. 51).

After Roesch began selling the Star manufactured products at less than D-15, two other Star distributors, Hussmann and Tour Ice, complained to Star about the low prices being quoted by Roesch. (TR. 398-402, 432-33, 455, 498-99).

On March 28, 1980, Debra Voges, who was in charge of Roesch's marketing, received a telephone call from Jack Rehder at Star. (TR. 55-58). Rehder expressed his anger with the low prices at which Roesch was selling Star products. He stated that Tour Ice was selling at the D-15 price and encouraged Roesch to do the same and make the extra profit. (TR. 57-58). Rehder explained that Roesch's prices were "messing up their distributors." (*Id.*)

Roesch refused to yield to the pressure from Star and continued to charge the sub D-15 prices. (TR. 59, TR-A 34, 35). On April 3, 1980, Rehder telephoned Bob Mann, a sales consultant to Roesch, and, for the first time, stated that Roesch should not use the Star name in selling the Star manufactured "private label" equipment. (TR. 181-82). Later that same day, Stan Griggs, the national sales manager for Star, telephoned Mann to inform him that Roesch was terminated as a Star distributor, effective immediately. (TR. 183-85). Griggs said the reason for the termination was that Roesch was "rocking the boat". (TR. 184).

On April 21, 1980, Roesch's Bob Voges telephoned Dave Smith at Star in an attempt to continue the selling arrangement between Roesch and Star. (TR-A 37). Voges taped the telephone conversation he had with Dave Smith on April 21, 1980, the recording of which was received in evidence and played to the jury. (PX 15, 16, TR. 49-51). Portions of the recording are reproduced as follows:

> Voges: Say, I've got a personal reason for calling. When we were over and had the meeting with your associates *we were pleased with the association with Star and Deb told me two weeks ago* just before you

left on your holiday *that this was terminated and I really wondered what we did wrong.* We tried to follow some rules.

Smith: Well, you were, we had hoped this would be a good thing for us, too, well a good thing for everybody, but, *well, you were causing all kinds of problems with our distribution in that one of the things we believe in, and that is, is making a reasonable margin selling these things. We have supported our stocking distributor on wholesale prices and you were under them consistently and you were going back to some of our people with lower prices* and you were talking about Star and not about your own product and it just muddied up the water. *One thing we don't want to do is to drive the gross margins out of this business.*

• • • • • • • • •

Smith: Well, I misunderstood this thing and I apologize for getting you involved in it. *I thought that you had your own customers that you were selling. I had no idea that you were going to come back and solicit all of our customers and tell them and offer them our merchandise at a lower price than our people were offering them. And that's exactly where the conflict was.* Your gals got on the phone and called everybody, every ice company anyplace.

• • • • • • • • •

Smith: *Well, the only way we could do it is mark it up, uh, sell it to you on such a basis that you could not sell below our people,* and you know, I don't understand, *our philosophy, well I don't know, my background is with Hussmann, we don't believe in cutting the price,* we're interested in selling the best quality product at a price that is reasonable for the value received.

• • • • • • • • •

Smith: *But then you come in and sell our product at under the market.*

* * * * * * * * *

Smith: *I'm talking about you're trying to sell under the market.* And you know if you worked for Lear *you know exactly what the hell I'm talking about, Bob.*

* * * * * * * * *

Smith: *Let's don't con each other. Let's don't kid each other.*

* * * * * * * * *

Smith: Well, look, we don't want to go away mad about this thing, we're only concerned about one thing, *we have made great strides in this market in the last 6 to 9 months and we just can't let you mess it up.* We don't have any hard feelings about it. We'd like to sell you but you have the philosophy you do about selling, I don't know, you'd see how it would work out. *We would have to price you so high that you wouldn't be able to compete in order to insure that you didn't cause us all kinds of problems.*

* * * * * * * * *

Smith: *You're well below the wholesale. The wholesale price in this thing is list less 15.*

* * * * * * * * *

Voges: List less 15?

Smith: *List less 50 less 15. That's the wholesale price.* That leaves you the way you were buying, 14 and 4. *And that ought to be the way you go and you'd be making money. Going out on that basis and sold.* Uh, you know. Because you're a boiler room you don't have

> any services to offer and you don't get to know the people *so it has to be on the basis of price.* I can understand that. *But I thought that you had your own customers that you had done business with and those were the people we were willing to sell you the equipment to take care of.* (emphasis added throughout)

Star contended at trial that Roesch's use of the Star name was the reason for the termination. Roesch referred to the Star manufactured products as "Star Maids." (PX 9). The name, which appeared only on the price sheets accompanying the Star color advertising literature furnished by Star to Roesch (TR. 291), was designed to fit in with the names of Roesch's other merchandisers: "Ice Boys", "Ice Maids", — "Star Maids." (PX 9). At no time until the day of the termination did Star indicate that use of the Star name was forbidden. (TR. 43, 85, 181-82). Bob Cordes, former executive vice president of Star, testified that there was never any prohibition of a private label purchaser using the Star name, and further, that no distributor had ever been terminated for using the Star name. (TR. 371, 372). In fact the Star representatives agreed to supply Roesch with negatives and art work bearing the Star name to be used in Roesch's catalogue and did so on March 13, 1980. (TR 24, 25, PX 7).

The original complaint was filed in this action on August 9, 1980 (R. 68) and the first amended complaint was filed on January 29, 1981. (R. 5). Jurisdiction was invoked under 28 U.S.C. §1337 and 15 U.S.C. §§1, 15 and 22. Commencing on April 14, 1981 the case was tried before a jury. (R. 72, TR. 2). The trial court refused to allow Roesch to present any evidence concerning damages.

B. The Decision Of The District Court

After Roesch had put forward its proof on the issue of liability, the defendants moved for a directed verdict. The Trial Court

granted the motion, ruling that

> [T]here was no conspiracy; no evidence on which a conspiracy could be based . . . .
>
> [T]here was no combination . . . .
>
> The contract was, and as far as I know the purpose of the termination was based on Hussmann and Star's reaction to complaints they received concerning the appellation Star Maid and things of that nature . . . .
>
> The Court will direct a verdict for the defendants." (Tr. 488-489).

C. The Decisions Of The Court Of Appeals

On March 4, 1982, a panel of the Eighth Circuit affirmed the District Court's grant of a directed verdict. *Roesch, Inc. v. Star Cooler, Corp.*, 671 F.2d 1168 (8th Cir. 1982),*aff'd on rehearing*, No. 81-1562 (8th Cir. *en banc* July 12, 1983). The same day a separate panel of the Eighth Circuit reached an inconsistent result in reversing a District Court's grant of summary judgment for the defendant on substantially similar facts. *Battle v. Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982), *rev'd on rehearing*, No. 81-1585 (8th Cir. *en banc* July 12, 1983). Accordingly, on October 13, 1982, the Eighth Circuit granted a rehearing *en banc* in both cases. By an equally divided court, the Eighth Circuit affirmed the District Court in both cases. *Roesch, Inc. v. Star Cooler Corp.*, No. 81-1562 (8th Cir. *en banc* July 12, 1983) and *Battle V. Lubrizol Corp.*, No. 81-1585 (8th Cir. *en banc* July 12, 1983). The affirming opinion *en banc* did not discuss the telephone conversation between Bob Voges of Roesch and Dave Smith of Star. The panel opinion discussed it only in a footnote, finding the conversation irrelevant because Smith did not mention any other distributor by name or any agreement between Star and its other distributors. The appellate opinions ignored Smith's references to "a good thing for everybody," "you were

causing all kinds of problems with our distribution," "at a lower price than our people were offering them. And that's exactly where the conflict was," "our people," "under the market," "our distribution system," and "we have supported our stocking distributor." In addition, no mention is made of Jack Rehder's statement that Roesch's prices were "messing up their distributors" and Stan Griggs statement that the reason for Roesch's termination was that Roesch was "rocking the boat."

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case to remedy the confusion and conflict within and among the Circuit Court decisions applying §1 of the Sherman Act in suits by terminated distributors or dealers who allege that their termination was caused by a price-fixing combination, contract or conspiracy among the manufacturer(s) and its remaining distributors or dealers.

This conflict arises in three major areas. First, the conflict over the necessary elements of a conspiracy claim. Second, the conflict over the type of evidence relevant to each element. Third, the conflict over the quantum of evidence necessary to create a jury question.

I. Certiorari Should Be Granted In Order To Resolve The Conflict Within And Among the Courts Of Appeals Regarding The Necessary Elements Of A Sherman Act §1 Combination, Contract Or Conspiracy To Fix Prices.

Both the Seventh and Fourth Circuits would unquestionably have permitted the *Roesch* case to have been decided by a jury. The Seventh Circuit recently stated that "[w]e believe that proof of termination following competitor complaints is sufficient to support an inference of concerted action." *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1238 (7th Cir. 1982), *cert. granted*, ____ U.S. ____, 103 S.Ct. 1249, 75 L.Ed.2d 479 (1983). The *Spray-Rite* court cited *Alloy International v. Hoover - NSK Bearing Co.*, 635 F.2d 1222 (7th Cir. 1980) for the proposition that:

> [A] terminated distributor presents sufficient evidence to support a verdict in its favor by proving (1) that the manufacturer received price complaints from the distributor's competitors, (2) that the manufacturer was concerned about raising his wholesale price and recognized that its ability to do so might be influenced by the

distributor's prices, and (3) that the manufacturer terminated the distributorship.

Spray-Rite, supra, at 1239.

The Fourth Circuit joined the Seventh Circuit in *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207 (4th Cir. 1983). The Fourth Circuit held that, given price-related complaints from distributors, plaintiff's subsequent termination by Michelin, and Michelin's statement that it was responding to *service-related* complaints of the distributors, a jury question existed on the "factual issue" of whether the termination was for service or price-related reasons. *Id.*, at 1215. Praising *Spray-Rite's* "highly lucid discussion of §1 liablility predicated upon termination of a dealer," *id.*, the Fourth Circuit held that once a plaintiff has offered evidence demonstrating a relationship between dealer complaints and manufacturer termination, the jury must decide whether the termination was in pursuit of a price-related end and, therefore, a *per se* violation of §1. *Id.*

Bostick explicitly holds that a conspiracy may be inferred from manufacturer termination even without any evidence that: (1) rival dealers believed or had been told that Michelin would take action against the plaintiff in response to their request; or (2) Michelin consulted with the complaining dealers after receiving their complaints. *Id.* at 1214, 1215. In short, the plaintiff in *Bostick* did not need to show that the conspiracy was the product of an actual contract. Conduct undertaken pursuant to a tacit understanding would suffice to create *per se* liability.

The Third Circuit has held that even if a plaintiff shows that it was terminated by the manufacturer "in response" to complaints by other dealers about the plaintiff's low prices, no conspiracy may be inferred. In the Third Circuit, the plaintiff must also show both that (1) the manufacturer took action that was "in contradiction" of his own economic interests; and (2) the manufacturer had some motivation to enter an agreement.

Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105, (3rd Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), citing *Venzie Corp. v. U.S. Mineral Products*, 521 F.2d 1309 (3rd Cir. 1975). In the *Sweeney* decision, because Texaco saved $58,000 per year by effectively raising the price charged to Sweeney prior to terminating him, the Third Circuit held that "this undisputed fact negates an inference of concerted action that might exist if both factors of *Venzie* were satisfied." *Sweeney, supra*, at 114.

The Second and Ninth Circuits have held that proof that a manufacturer terminated a distributor *in response* to price-related complaints from the dealer's competitors is sufficient to raise the inference of conspiracy. *Filco v. Amana Refrigeration, Inc.*, 709 F.2d 1257 (9th Cir. 1983); *Schwimmer v. Sony Corp. of America*, 677 F.2d 946 (2d Cir. 1981), *cert. denied*, _____U.S._____, 103 S.Ct. 362, 74 L.Ed.2d 398 (1982); *H.L. Moore Drug Exchange v. Eli Lilly*, 662 F.2d 935 (2d Cir. 1981), *cert. denied*, ____ U.S. ____ 103 S.Ct. 176, 74 L.Ed. 2d 144 (1982). However, these circuits impose stringent requirements limiting the ways in which a plaintiff can demonstrate the "fact" of responsive action.

In *Filco*, the court required that the relation between the price related complaints and dealer termination be shown by "either evidence of direct coercion or of a causal nexus between complaints and termination." *Filco, supra*, at 1263. The court further held that evidence of coercion must be of "threats or demands" rather than "mere exposition, persuasion, argument, or pressure." *Id.* This additional requirement of proof necessary to make out a §1 claim, cannot be reconciled with recent Seventh and Fourth Circuit cases discussed above.

In *Schwimmer v. Sony, supra*, the Second Circuit reversed the lower court's judgment upholding a jury verdict for the plaintiff. The Second Circuit concluded that:

> [W]e find no evidence in the record from which the jury could reasonably have inferred that in 1976 or 1977 Sonam

> and any of its customers entered into an agreement, either express or tacit, to discourage transshipping of Sony consumer products.

Schwimmer, supra, at 953.

The Second Circuit granted judgment notwithstanding the verdict for the defendants despite the existence of evidence that the dealers complained of plaintiff's activities, that the manufacturer and its dealers both wanted to reduce discount distribution (or "transshipping"), and that the plaintiff's distributorship was terminated following the complaints. In *Schwimmer,* the Second Circuit has imposed the requirement that the plaintiff offer direct evidence of an agreement between the manufacturer and its distributors in order to demonstrate "a causal nexus" between dealer complaints and the plaintiff's termination.

The Eighth Circuit *en banc* opinion in *Roesch, Inc. v. Star Cooler,* No. 81-1562, (8th Cir. *en banc* July 12, 1983) (affirming the District Court by an equally divided court) crystallizes the conflict among the Courts of Appeals. The *en banc* opinion affirming the District Court states the applicable legal standard in such vague terms that any Court of Appeals decision except *Sweeney* would fit within the rule. *Roesch en banc* states:

> . . . [A] *per se* violation of section one would be established by proof that Star Cooler terminated its relationship with Roesch at the request of competing distributors and that the termination was in pursuit of a price related end.

Id., slip op., at 3-4.

The dissenting opinion in *Roesch* and the companion case both agree with this legal standard! *Battle v. Lubrizol,* No. 81-1585, slip op. at 4-5, (8th Cir. *en banc* July 12, 1983), (McMillian, J. dissenting).

Both the affirming and dissenting opinions in the *Battle* and *Roesch en banc* cases also agree that "a manufacturer's termination after receiving complaints cannot be characterized in and of itself as responsive action permitting an inference of concerted action." *Battle, supra,* slip op. at 3; *Battle, supra,* slip op. at 5, (McMillian, J. dissenting) (The dissenting opinion in *Roesch* adopts the dissenting opinion set forth in *Battle*).

The standard of law in this area is so muddled that even though the eight judges of the Eighth Circuit agree on the formulation of the applicable standard, they split evenly on the application of that standard to the facts of two separate cases.

It is respectfully suggested that this case, in which an *en banc* Court of Appeals could not render a majority opinion, is an appropriate companion case to *Spray-Rite v. Monsanto, supra.* The issues presented are virtually identical.

II. Certiorari Should Be Granted In Order To Clarify The Type Of Evidence Relevant To Prove The Elements Of A Sherman Act §1 Combination, Contract Or Conspiracy.

The conflict among the Circuits is even more severe than a bare examination of the different legal rules indicates, because the quality and quantity of proof required to make out a §1 claim in distributor or dealer termination cases varies dramatically from Circuit to Circuit, even when the Courts of Appeals purport to apply similar standards. The affirmation of summary judgment by the Ninth Circuit in *Filco* provides a dramatic example of an appellate court's departure from its own legal standard. The evidence showed that:

> "Casimir [an Amana executive] threatened to terminate Filco if it continued to discount Amana products.
>
> 'I don't want Amana to be discounted. I don't want to make a K-Mart out of Amana, you know, with the low prices . . . If you want to have Amana, you have to do so

> and so. You have to maintain the price. You cannot discount it." *Filco, supra,* at 1263. (ellipsis in original)

Furthermore, another Amana official told a Filco employee: "[T]ry to keep it down as far as prices because I have Lamco on my back. You're my friends. I don't want to lose their account you know." *Id.*, at 1264.

The Ninth Circuit characterized the latter statement as "mere encouragement," while stating that the former statement, though obviously related to pricing, was subsidiary to the "main concern . . . that Filco provide the presale services that are required by all stores selling Amana products." *Id.* at 1263-64. Taken in combination, these two statements clearly show a connection between both competitor complaints (Lamca's complaints in particular) and Amana's concern over pricing and between Filco's pricing and the implied threat of termination.

In upholding summary judgment for Amana, the Ninth Circuit imposed a far stricter proof requirement than should be required by the legal standard which it ostensibly employed. The Ninth Circuit in *Filco* is in effect demanding independent and direct evidence of a price-fixing agreement between a manufacturer and its distributors.

In *Spray-Rite, supra,* there was evidence both that Monsanto terminated Spray-Rite because it lacked technically competent service personnel and also testimony by Spray-Rite's president that a Monsanto executive told him that the termination was in response to distributors' price complaints. The evidence was that Monsanto terminated Spray-Rite because of price complaints based upon the testimony of Spray-Rite's president. The court held that this hearsay testimony was sufficient to present a jury question on the causation issue. *Spray-Rite, supra,* at 1238-39. The Seventh Circuit's decision is obviously irreconcilable with *Filco* even though the formulation of the legal standard applied in the two cases appears very similar.

In *Schwimmer, supra,* by contrast, the court found no jury issue on the conspiracy question despite evidence adduced at trial (though not mentioned in the Second Circuit's opinion that: (1) Sony required that Supersonic not ship products into Florida; (2) a Sony executive stated that pressure was being "slowly" applied to cut down transshipping; and that (3) another Sony executive had made a decision to put the "clamps" on transshippers. *See* Petition For Certiorari at 8-9, *Schwimmer, supra.*

The evidence of any overt agreement in *Bostick, supra,* is similarly based upon the reasonable inferences which the jury could draw from the evidence. The *Bostick* court specifically distinguished between plaintiff's two theories. The first alleged that Bostick was terminated to enforce a formal resale price maintenance program. The second, which is at issue here, alleged that Bostick was terminated in response to competitor complaints of price-cutting. The evidence indicating a causal relation between the price-cutting complaints and the termination was a Michelin executive's statement that the termination was a response "to the disillusionment of other dealers stemming from Bostick's lack of service facilities." *Bostick, supra,* at 1214. The Court of Appeals treats this statement as an admission that "the termination was something more than a unilaterally motivated action." *Id.*

The panel opinion in *Roesch,* which was "essentially" approved by the *en banc* court, *Roesch, supra,* slip op. at 2, shows that a dispute over the appropriate standard of proof is the source of the disagreement over the application of the legal rule on which all the judges agree. The *Roesch* panel and the court *en banc* ignored the evidence of the distributors' price-related complaints because these conversations carried no explicit evidence of an "agreement" between the manufacturer and the distributors. The *Roesch* panel and the court *en banc* likewise ignored the taped conversation between David Smith of Star and Bob Voges of Roesch in which Smith stated:

(1) "You were causing all kinds of problems with our distribution . . .. One thing we don't want to to is drive the gross margins out of this business."

(2) "Well, the only way we could do it is mark it up, uh, sell it to you on such a basis that you could not sell below our people, and you know . . . our philosophy . . ., my background is with Hussmann, we don't believe in cutting the price . . .."

(3) "We would have to price you so high that you wouldn't be able to compete in order to ir sure that you didn't cause us all kinds of problems."

Despite the evidence that (1) Roesch was causing "problems" with Star's other distributors; (2) that Star didn't want its distributors price-cutting; and (3) that the price Star would sell to Roesch was determined by the level at which Star's other distributors could compete with Roesch; the panel held that this conversation was *irrelevant* to the conspiracy issue because Smith neither named any of Star's other distributors nor referred to any explicit "agreement" between Star and its distributors. *Roesch, supra,* 671 F.2d at 1172 n. 8. The panel majority and the affirming *en banc* opinion effectively require that a conspiracy be proven not by conduct evidencing agreement, but by incriminating admissions from the conspirators themselves. The legal standard which they actually apply ignores the well-settled antitrust doctrine that conspiracy will most often be proved not by a written contract or explicit agreement, but by circumstantial evidence and the record created by defendants' conduct. In *Eastern States Retail Lumber Ass'n v. United States,* 234 U.S. 600 (1914) the Supreme Court stated:

> It is elementary . . . that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the thing actually done; and when in this case, by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the

> other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred.

Id. at 612. *Accord, Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1961).

Obviously one cannot expect the Hussmann or Tour Ice representatives to openly admit they conspired or encouraged Star to terminate Roesch. Likewise, one cannot expect Star's representatives to incriminate themselves by admitting that they terminated Roesch in response to the distributors' complaints. But antitrust law does not and should not require proof of conspiracy by direct testimony. Jurors are permitted to infer the existence of a conspiracy from the circumstantial evidence presented when viewed in its entirety. *Interstate Circuit v. United States*, 306 U.S. 208 (1939); *Eastern States Retail Lumber Ass'n v. United States*, 234 U.S. 600 (1914). *Accord, Continental Ore Co. v. Union Carbide & Carbon Corp., supra.* The Eighth Circuit's mode of analysis in the present case conflicts not only with these precedents but also with the standard which the Court says it will apply. Therefore a grant of certiorari is appropriate.

III. Certiorari Should Be Granted In Order To Define The Proper Relationship Of Judge And Jury In Sherman Act §1 Cases.

Perhaps the most disturbing aspect of the conflict among the Courts of Appeals in this area is the denigration of the jury resulting from the impermissible weighing of evidence which the Second, Third, Eighth and Ninth Circuits have approved by upholding directed verdicts and summary judgments and entering judgments notwithstanding the verdict. The opinions of these Circuits in Sherman Act §1 cases parse the evidence extensively in order to show that no "reasonable" juror could find a Sherman Act §1 conspiracy. In doing so, the Courts of Appeals

not only distort their own legal standards, but they threaten the continued vitality of the Seventh Amendment in complex antitrust litigation.

Filco v. Amana, supra, is a prime example of the tendency of Courts of Appeals to reject a plaintiff's showing of a Sherman Act §1 violation based on the judge's own sense of the most probable inferences suggested by the evidence.

Even though the plaintiff showed unequivocally that (1) the Amana representatives asked plaintiff to keep prices high because of competitor complaints (*Filco, supra,* at 1264) and that (2) Amana required that its distributors not discount prices, *id.*, the court concluded that no reasonable jury could infer that the statements, "If you want to have Amana, you have to do so and so. You have to maintain the price. You cannot discount it," imply a threat of termination. *Id.* It is difficult to imagine any more overt threat of termination for failing to maintain a suggested price. If this evidence does not create a jury question on the issue of whether Amana threatened termination in order to make Filco maintain prices, then one wonders what factual issues remain left for the jury to resolve.

The Ninth Circuit has distorted summary judgment law in order to mask its distortion of antitrust law. Summary judgment should be granted only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c).

Although the Ninth Circuit pays lip service to the proper standard by reciting that summary judgment is proper only if there are not material disputed facts, the opinon, in fact, weighs the evidence. Mrs. Dusa, widow of an Amana representative, testified that her husband received "voluminous and virulent" complaints about Filco. The court downplays this testimony by inferring that:

> "[T]he long time gap, at least seven to nine months, between the time the dealers first complained to Dusa and the time that Filco was terminated *suggests* that Filco's termination was not caused by the complaints." *Filco, supra,* at 1265. (Emphasis added).

To decide a motion for summary judgment based upon what the evidence "suggests" to the Court is directly contrary to Fed. R. Civ. P. 56(c).

In *Sweeney, supra,* the court was faced with conflicting testimony from Daniel Doherty, a Texaco executive, concerning the reasons for the final decision to terminate the plaintiff's franchise. If the jury found Doherty was being less than candid about his knowledge of Sweeney's price-cutting, the jury could also certainly infer that his decision to terminate Sweeney was due to price-cutting. But the Third Circuit held that;

> Viewed in the light most favorable to the appellants, only three reasonable and permissible inferences relevant to Sweeney's lawsuit flow from this testimony. First, Texaco did not object to Sweeney's low prices. Pricing was "entirely" Sweeney's prerogative. Second, Texaco's concern over failure to meet housekeeping, service, or service capability standards-practices contrary to 'the prestige service that had been the hallmark and objective of Texaco retail marketing' — and resulting customer complaints. Third, these concerns led Doherty to the decision to terminate Sweeney's distributorship. *Id.* at 113.

The Court, therefore, affirmed the grant of a directed verdict. By ignoring the jury's role in assessing the credibility of witnesses, the Third Circuit violated the rule that, in a motion on a directed verdict, the evidence must be viewed in the light most favorable to the plaintiff. *Continental Ore Co. v. Union Carbide Corp.,* 370 U.S. 690, 696 (1962); *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464 (1962).

In *Roesch en banc* , the affirming Eighth Circuit opinion disregarded the evidence creating a jury question even more egregiously than did the *Filco* and *Sweeney* courts. The *en banc* opinion *did not even discuss* the tape recorded conversation between Bob Voges and David Smith, in which Smith explained that the termination was for, among other things, "causing all kinds of problems with our distribution," and then stated that Star would only sell to Roesch at a "[price] . . . so high that you wouldn't be able to compete in order to insure that you didn't cause us all kinds of problems." Nor did the opinion discuss the conversation between Jack Rehder and Debra Voges, in which Rehder berated Ms. Voges for not selling at the recommended price. By discussing only the complaints from Tour Ice and Hussmann to Star, and then blandly concluding that these did not rise to the level of a conspiracy, the *en banc* court attempted to disguise the fact that it has taken over the jury's function. By discussing only one portion of Roesch's proof, the *en banc* opinion creates the illusion that Roesch offered no evidence from which a reasonable jury could have inferred a "causal nexus" between the complaints and the termination.

The method of the Second, Third, Eighth and Ninth Circuits in the cases discussed herein is to remove complex commercial issues from the province of the jury by manipulating the rules of law and of sufficiency of evidence applicable to §1 dealer termination cases. Perhaps the courts believe that juries do not possess the requisite knowledge or intelligence to decide these issues. In effect, these Circuits are fashioning legal requirements so that this type of antitrust case may always be decided by the judge if he disagrees with the jury's verdict. The Supreme Court cannot allow this short-sighted, *ad hoc* policy to threaten the constitutionally guaranteed jury trial right. Whether or not District Courts and Courts of Appeal believe that juries are incapable of dispassionately and intelligently evaluating conflicting and complex evidence, the Supreme Court cannot allow lower courts to remove decisions in this area of law to a self-

appointed league of judicial experts. A decision by the Supreme Court in this area would be a helpful guide to the District Courts and Courts of Appeals.

IV. Certiorari Should Be Granted Because The Trial Court Excluded Admissible Evidence Relevant To The Issue Of Whether A Price-Fixing Combination, Contract, Or Conspiracy Existed Between Star And Its Distributors.

Federal Rule of Evidence 401 defines "relevant evidence" to mean:

> [E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Federal Rule of Evidence 402 states:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Roesch made an offer of proof of certain written contracts between Star and its distributors relating to the sale of Star products, including ice merchandisers. (TR. 377, 458, PX 32-37). The contracts, all of which were made within five years of the antitrust violations charged in this case, illustrated the intent and general practice of Star and its distributors to fix minimum resale price levels. *Id.*

Star objected that these contracts had been cancelled, but never offered proof of the cancellation. Even if the written contracts had been cancelled, they were still relevant to show: (1) it was the intent and general practice of Star to fix minimum resale price levels, and (2) Star's distributors, Hussmann and Tour Ice,

knew of this general practice and thus expected action from Star in response to their complaints of Roesch's sales in their areas below the D-15 price.

In *Fontana Aviation, Inc. v. Beech Aircraft Corp.*, 432 F.2d 1080 (9th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971), the Ninth Circuit, held that prior contracts imposing territorial restrictions on sales could provide the basis for inferences by the jury that a conspiracy to restrain trade existed even though the contracts had been cancelled.

> There was evidence from which the jury could have found that this arrangement continued up to the 1966 standard agreement coming into effect. If Beech, in good faith, had eliminated unlawful antitrust aspects of its marketing arrangements by the 1966 contract then, of course, the conspiracy violative of the Sherman Act would have also ceased and the company should not be penalized for its efforts to set its house in order. *On the other hand window dressings and changes of words in contracts are not controlling. The matter is one of substance and not form. Id.* at 1084. [Emphasis added].

The Ninth Circuit never doubted the relevancy of the pre-1966 contracts even though they had apparently been modified. Similarly, in the present case the relevancy of Star's previous contracts with its distributor should not have been doubted, even though they were allegedly cancelled.

The jury should have been permitted to receive this evidence from which it could make the reasonable inference that Star's general practice and intent were to fix resale prices. The jury could reasonably have inferred that the alleged cancellations of the contract were mere "window dressings." "The matter is one of substance," as evidenced by Defendants' actions in causing Plaintiff's termination, "and not form." *Id.* at 1084.

In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the plaintiffs attempted to introduce evidence that the charged conspiracy and monopolization began in the early 1930's, that overt acts in furtherance thereof occurred in the 1930's, and that it was pursuant to this anticompetitive scheme that the plaintiffs were eliminated from the industry after 1938. The Supreme Court held that this evidence of defendants' prior actions which occurred within five years of the antitrust violations, "was clearly material to petitioners' charge that there was a conspiracy and monopolization in existence when they came into the industry, and that they were eliminated in furtherance thereof." *Id.* at 709, 710.

Similarly, in the present case, the evidence of Star's contracts with its distributors was clearly material to show that a conspiracy to fix resale prices existed at the time Roesch began to sell Star manufactured products and that Roesch was terminated in furtherance of this conspiracy. The contracts were all made within five years of the antitrust violations charged and thus are not too remote to have sufficient probative value. *Id.*

The contracts between Star and its distributors have additional relevance other than to prove Star's intent and general practice to fix resale prices. The jury could reasonably have inferred from the existence of such contracts that Hussmann and Tour Ice complained to Star about Roesch's discount prices with the expectation that Star would put a stop to the price cutting.

The trial court's original exclusionary ruling was based upon the Fair Trade Proviso to Section 1 of the Sherman Act, which was repealed in 1975. (TR. 377). When this was later brought to the court's attention it again ruled against Roesch, without explanation. (TR. 457-58). It was clearly error for the trial court to exclude such evidence. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 709-10 (1962; *Standard Oil Co. v. United States,* 221 U.S. 1, 75, 76 (1911).

CONCLUSION

The issues raised in this case present the Court with an opportunity to resolve the conflict and confusion within and among the Courts of Appeals as to the requisite elements of liability and the sufficiency and methods of proof applicable in Sherman Act §1 suits by a terminated dealer or distributor who alleges that his termination was caused by a price-fixing combination, contract or conspiracy among the manufacturers and the remaining distributors. This case additionally raises the issue of the proper standard to be applied by the Courts of Appeals and District Courts in ruling on motions for directed verdict in Sherman Act §1 cases. For the foregoing reasons, Petitioners respectfully submit that this Court should grant the Petition for a Writ of Certiorari.

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APPENDIX

APPENDIX A

Roesch, Inc., et al.,
Plaintiffs,

v.

Star Cooler Corporation, Tour Ice Midwest, Inc., and Hussmann Refrigeration, Inc.,
Defendants.

No. 80-1081 C (1).

United States District Court,
E. D. Missouri, E. D.

May 1, 1981.

Larry B. Luber, William J. Travis, Greensfelder, Hemker, Wiese, Gale & Chappelow, St. Louis, Mo., for plaintiffs.

Barry A. Short, St. Louis, Mo., Byron Roche, Burton Halpern, Bridgeton, Mo., for defendants.

MEMORANDUM

WANGELIN, Chief Judge.

This suit was brought under Section 1 of the Sherman Act, 15 U.S.C. § 1, by plaintiffs Roesch, Inc., and its wholly owned subsidiary Marketing Division, Inc., against defendants Star Cooler Corporation, Tour Ice Midwest, Inc., and Hussmann Refrigeration.[1] The gravamen of plaintiffs' complaint was that it was terminated as a "private label" customer of Star Cooler pursuant to a conspiracy between two or more of the defendants to fix or maintain the resale prices of ice merchandisers in the United States.

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[1] Counts II, III and IV of plaintiffs' Amended Complaint were dismissed by stipulation of the parties prior to trial. These other counts alleged violations of Section 2 of the Sherman Act and of the Missouri and Illinois antitrust statutes.

Trial of the matter was commenced on April 14, 1981, and continued through April 21, 1981. At the close of plaintiffs' case on liability, all defendants moved the Court for directed verdicts. The Court heard arguments on these motions and, after consideration of the evidence adduced by plaintiffs at trial and the legal briefs and memoranda filed by the parties prior to trial, concluded that verdicts for the defendants should be directed pursuant to Rule 50, Fed.R.Civ.P. After viewing the evidence, together with all reasonable inferences to be drawn therefrom, in the light most favorable to plaintiffs, the Court finds that no reasonable person could find in favor of plaintiffs in this lawsuit and thus directed verdicts should be ordered. *Dobson* v. *Bacon Transport Co.*, 607 F.2d 805, 806-807 (8th Cir. 1979); *Lisa-Jet, Inc.* v. *Duncan Aviation, Inc.*, 569 F.2d 1044, 1046 (8th Cir. 1978); *Decker-Ruhl Ford Sales, Inc.* v. *Ford Motor Credit Co.*, 523 F.2d 833, 836-837 (8th Cir. 1975).

FACTUAL BACKGROUND

This case principally concerns the sale and marketing of a refrigerated bin designed to hold packaged ice, known as an "ice merchandiser." Roesch entered into a verbal agreement with Star Cooler during the first week of March, 1980, to purchase "private label" ice merchandisers from Star Cooler (together with other products). The testimony concerning this verbal agreement shows that the products sold to Roesch were to have various changes in appearance to make them resemble the type of ice merchandisers sold by Roesch.[3] Counsel for plaintiffs made the judicial admission to the Court that this verbal agreement dealt exclusively with "private label" merchandise.

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[3] At the time of this verbal agreement, Roesch sold three other lines of ice merchandisers: (1) a line it manufactured for resale; (2) a line of "private label" ice merchandisers it purchased from Leer Manufacturing Co.; and (3) a line of Leer ice merchandisers, sold under the Leer tradename. The Leer agreement further provided that it was terminable at will by either party with 30 days notice.

After this verbal agreement was reached, plaintiffs immediately thereupon commenced selling Star-built ice merchandisers as "Star Maid" ice merchandisers through direct telephone solictations over the telephone. This slogan, "Star Maid," (which is indistinguishable from the statement that the products were "Star-*made*" when used over the telephone) was not discussed with Star Cooler before it was used.

After about eleven days of selling tnese products, during the first week of April, 1980, plaintiffs were advised by a representative of Star Cooler that the verbal agreement between the parties was terminated. In a subsequent letter to Roesch's counsel dated July 24, 1980, the General Manager of Star Cooler stated the reason for this decision as follows:

> "Star Cooler Corporation has never orally or in writing authorized Roesch, Inc., as a distributor of its products. Star manufactured equipment for Roesch pursuant to Star's understanding that Roesch desired to purchase certain items in Star's product lines to be marketed under the Roesch trade name and represented to customers of Roesch as Roesch products. Contrary to such representations made by Roesch to Star, Roesch represented this equipment as being Star manufactured and as Star equipment. When this conduct persisted, Star declined to further "private label" such equipment for Roesch. Star has completed and delivered all items of equipment ordered by Roesch, Inc., from Star." (Plaintiffs' Exh. 21)

Plaintiffs proposed to prove that this decision to terminate the verbal "private label" agreement with Roesch was pursuant to a conspiracy between Star Cooler and others of its distributors to fix the resale price of ice merchandisers and that the Roesch agremeent was cancelled because Roesch offered Star Cooler equipment at prices below the prevailing market prices for ice merchandisers.

The evidence showed that Star Cooler offered Roesch, Inc., a discount of about 65 percent off list price on the ice merchandisers sold under the verbal private label agreement.[3] This is the lowest discount offered to any customer by Star Cooler; the only other purchasers entitled to this discount are distributors of Star-labeled ice merchandisers who make volume purchases of the product, maintain inventories, and employ service personnel to install the units and to honor warranty claims. Roesch was not obligated to fulfill any of these conditions in order to obtain the 65 percent discount. Roesch made only such purchases of Star equipment as it had already sold through telephone solicitations.

Plaintiffs contended that Star Cooler and its distributors agreed to fix the resale price of Star ice merchandisers at a certain level (called "D-15" or "List less 50 percent less 15 percent). There was evidence that Star Cooler in September 1979 suggested to some of its "stocking distributors" that they offer ice merchandisers for sale at "D-15" price levels, but there was no evidence that this suggestion was followed or that Star Cooler ever applied any pressure or coercion on any distributor to adhere to this price. For example, no suggestion concerning its resale prices was made to Tour Ice Midwest at any time nor did Tour Ice discuss the prices it was charging for Star ice merchandisers with anyone at Star Cooler. Plaintiffs presented no evidence concerning (1) the volume of sales of ice merchandisers in the United States, (2) the share of this market enjoyed by Star Cooler, (3) the number of distributors competing in the ice merchandiser industry, (4) the nature and extent of price competition in this industry, or (5) the volume of sales made by Star Cooler or any other party at "D-15" levels.

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[3] This discount is stated as "List Price less 50 percent less 15 percent less 14 percent less 4 percent."

The evidence at trial was that at no time prior to the termination of the parties' verbal agreement did Star Cooler make any suggestion to Roesch concerning the resale prices Roesch should charge for ice merchandisers manufactured by Star or impose any restriction of any type on Roesch's ability to sell Star manufactured equipment, except that Star contends that Roesch agreed to sell the equipment on a private label basis rather than as a Star product.

Finally, the evidence at trial, in the words of Roesch's President and principal shareholder, Robert Voges, showed that plaintiffs' growth in the ice merchandiser market "has been substantial" (Tr. 8) and "I'm pretty well pleased with the market penetration we have made" (Tr. 12). In 1980, Roesch sold $950,000 in ice merchandisers.

LEGAL CONCLUSIONS AND FINDINGS

The Roesch verbal private label "agreement"—to the extent such an agreement existed—was plainly terminable at will by either party. *Lockewill, Inc.* v. *United States Shoe Corp.*, 547 F.2d 1024, 1029 (8th Cir. 1976), *cert. denied*, 431 U.S. 956, 97 S.Ct. 2678, 53 L.Ed.2d 272 (1977) (construing Missouri law). Plaintiffs have so acknowledged and have not proceeded on a claim that Star Cooler breached the agreement.

In order to prove that defendants violated Section 1 of the Sherman Act, plaintiffs had to prove:

(1) That there was a conspiracy between two or more of the defendants or between a defendant and some other party, that resulted in the termination of the private label agreement between Roesch and Star Cooler;

(2) That the conspiracy referred to in Paragraph (1) had the intent or effect of unreasonably restraining trade in ice merchandisers in the United States.

Plaintiffs failed to prove either of these two elements of a Section 1 violation.

A

There was no evidence of any conspiracy between Star Cooler and any other person or entity to terminate the verbal private label agreement with Roesch. Plaintiffs' sole evidence relating to the alleged conspiracy involved the deposition testimony of D.H. Smith of Star Cooler and Donald Carpenter of Tour Ice Midwest, who described two telephone conversations in which they participated. These two conversations were between distributors of Star Cooler and employees of Star, during which the sales and pricing practices of Roesch were described by the distributors.[4] During their depositions, Messrs. Smith and Carpenter testified that no agreement was reached during these telephone calls that Star Cooler would terminate its agreement with Roesch; they also testified that the distributors did not request, nor did Star Cooler's employees volunteer, any such action.

Plaintiffs claim that from these facts, the jury could infer that there was an antitrust conspiracy between these parties to terminate the Roesch agreement. They ignore the settled principle that:

> "Mere complaints by customers of a manufacturer that distributors and dealers engage in price-cutting and selective discounting are not enough to imply a combination in violation of § 1, for such complaints arise in the normal course of business."

Interphoto Corporation v. *Minolta Corporation,* 295 F.Supp. 711, 719 n. 3 (S.D.N.Y. 1969), *affirmed,* 417 F.2d 621 (2d Cir.

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[4] These two distributors, Tour Ice Midwest and Hussmann Refrigeration, Inc., are co-defendants in this action.

1969) (Per Curiam); *Carbon Steel Products Corp.* v. *Alan Wood Steel Co.*, 289 F.Supp. 584 (S.D.N.Y. 1968); *Carr Electronics Corp.* v. *Sony Corporation of America*, 472 F.Supp. 9, 13 (N.D.Cal. 1979) As the Second Circuit held in *Borger* v. *Yamaha Intern. Corp.*, 625 F.2d 390, 395 (2d Cir. 1980), "it was not improper for [the defendant] to consult with its dealers and . . . those consultations, standing alone, would not establish the existence of a combination or agreement under the Sherman Act." In *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, ____ U.S. ____, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981) (1011 ATRR A-1), the Court recently upheld a grant of a directed verdict on facts quite similar to those in this case, holding:

> "The necessry first step toward appellants' proof of a prohibited § 1 conspiracy was proof of a causal relationship between competitor complaints that Sweeney was selling Texaco gasoline several cents below their own price, and the reduction of Sweeney's hauling allowance . . . . *The mere reception of complaints by Texaco would be insufficient to prove this causal nexus.* Nor would it suffice to prove only that some Texaco employees who knew of the complaints were also the ones who decided to terminate Sweeney's distributor agreement and change its hauling allowance. The evidence must permit the inference that the alleged conspirators 'had a unity of purpose or a common design and understanding, or a meeting of the minds.' " (Emphasis supplied) (Citations omitted)

As in the *Sweeney* case, no such "causal nexus" was proven, and in the absence of evidence that Star Cooler decided to terminate Roesch because of competitor complaints and evidence of such a conspiracy, "it would have been improper for the court to allow the jury to speculate on the cause for [the defendant's] action." *Id.* at 115.

The telephone conversations between Star Cooler and the two distributors did not evidence a conspiracy. In the case of Tour Ice Midwest, the only testimony concerning this call appeared in the deposition testimony of Donald Carpenter, who explained that he called merely to inform Star Cooler that Roesch was holding itself out as a Star distributor with the intent to demand that Tour Ice be given the same discount that Roesch was injoying. Such complaints designed to demand equal treatment on the part of a manufacturer are lawful and, indeed, promote the goals of the Robinson-Patman Act. *Westinghouse Electric Corp.* v. *CX Processing Laboratories, Inc.*, 523 F.2d 668, 676 (9th Cir. 1975); *Baer* v. *Esprit de Corp.*, 1980-81 CCH Trade Cases ¶ 63,614 at 77,262 (N.D. Calif. 1980).

With respect to Hussmann Refrigeration, Inc., plaintiffs failed to offer any evidence from which the jury could have inferred the existence of an agreement or combination with Star Cooler to terminate the agreement with Roesch. Additionally, plaintiffs failed to sustain their burden of proving that Hussmann and Star were legally *capable* of conspiring together inasmuch as the two companies were both wholly owned by Hussmann Refrigerator Company and acted as part of the same economic entity. *See Ogilvie* v. *Fotomat Corporation*, 641 F.2d 581 (8th Cir., 1981).

Plaintiffs have referred the Court to one case that is arguably relevant to their theory concerning the inference of a conspiracy in these circumstances, *Girardi* v. *Gates Rubber Company Sales Division, Inc.*, 325 F.2d 196 (9th Cir. 1963). This case has been often distringuished and is of questionable authority,[5] and in

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[5] *Chisholm Bros. Farm Equipment Co.* v. *International Harvester Co.*, 498 F.2d 1137, 1141 (9th Cir.), *cert. denied*, 419 U.S. 1023, 95 S.Ct. 500, 42 L.Ed.2d 298 (1974); *A.G. Rogers Co.* v. *Merck and Co., Inc.*, 498 F.Supp. 5, 7-8 (E.D. Tenn. 1980); *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 478 F.Supp. 243, 256 (E.D.Pa. 1979), *affirmed*, 637 F.2d 105 (3d Cir. 1980); *Carr Electronics Corp.* v. *Sony Corp. of America, supra*, 472 F.Supp. 9, 13 (N.D.Cal. 1979); *Belk-Avery, Inc.* v. *Henry I. Siegel Co., Inc.*, 457 F.Supp. 1330, 1335 (M.D. Ala. 1978); *Plastic Packaging Materials, Inc.* v. *Dow Chemical Co.*, 327 F.Supp. 213, 227 (E.d. Pa. 1971).

any event is easily distinguished from the present case. In *Girardi,* plaintiffs proved that defendant Gates Rubber established a suggested resale price for its products that was adhered to by its two distributors in the Stockton, California area; that when one of these two distributors threatened to offer prices below these suggested retail prices at two of its three resale outlets, it was threatened with termination if it did so; that Gates received complaints from its other distributor concerning Girardi's discounting activities, and that internal memoranda of the defendant showed that Girardi's competitors "are putting a lot of pressure on us to make this impossible for him." *See* 325 F.2d at 200-03. Indeed, the evidence further showed that prior to establishment of plaintiff as a distributor of Gate's products, there were complaints from other distributors—and Gate's persuaded them that they "would be better off with [plaintiff] handling Gates belts where we could exercise some control over his marketing practices than he would be were [plaintiff] compelled to take on one of the gyp lines and follow through with a price eroding marketing policy." *Id.* at 202.

There was no similar evidence here. Robert Voges and his daughter Debra, who managed Roesch's direct sales operations of ice merchandisers, admitted that Star Cooler made no suggestions to them prior to termination concerning heir resale prices. There was no threat of termination, in an attempt to induce adherence to suggested resale prices. Nor was there any internal documents or any other evidence that Star Cooler acted in response to any pressure from other distributors. In these circumstances, it would be impermissible speculation for the jury to draw any inference as to the existence of an antitrust conspiracy.

B

Even if it were assumed, ***arguendo,*** that plaintiffs made a sufficient factual showing on the existence of a conspiracy to justify sending the case to the jury, they failed to prove that this

conspiracy had the effect or was entered into with the intent of unreasonably restraining trade. Accordingly, the plaintiffs failed to meet their burden of proof with respect to the second element of a Section 1 case.

Plaintiffs relied solely on the claim that the alleged conspiracy to terminate Roesch's agreement was part of a broader conspiracy to fix the resale prices of Star ice merchandisers in the United States. They point to the fact that in September 1979, Star Cooler issued a memorandum to stocking distributors suggesting that resale prices of ice merchandisers should not be discounted below "D-15" and they point to the fact that during a telephone conversation between David Smith (of Star Cooler) and Robert Voges (of Roesch), which Mr. Voges secretly recorded,[4] Mr. Smith made several references to the fact that Roesch's prices on ice merchandisers were below the market and were undercutting other distributors. From these facts, plaintiffs argue that the jury could infer the existence of a price-fixing conspiracy.

Plaintiffs presented no evidence, of any type, that any distributor of Star Cooler products adhered to any fixed or agreed upon resale price. Indeed, Debra Voges (who managed the direct telephone sales solicitations staff at Roesch), stated that she would not be surprised if Tour Ice sold ice merchandisers below "D-15" nine times out of ten. There is no evidence that Star Cooler ever threatened any distributor with termination if it did not adhere to any fixed price or that Star Cooler imposed any restrictions of any type on its distributors. The Roesch employees acknowledged that Star Cooler imposed no restraints on *their* ability to sell Star-manufactured products.

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[4] Mr. Voges testified that he made it a practice secretly to record telephone conversations when made to persons outside the state of Illinois because, he explained, he had been advised that it was a felony in the State of Illinois to make such secret recordings. Indeed, Ill. Rev.Stat. Ch. 38, § 14-6 so provides.

In these circumstances, there can be no inference that the defendants were engaged in price fixing. The issuance of recommendations concerning resale prices is, of course, wholly proper. *Chisholm Bros. Farm Equipment Co.* v. *International Harvester Co.*, 498 F.2d 1137, 1142-43 (9th Cir.), *cert. denied*, 419 U.S. 1023, 95 S.Ct. 500, 42 L.Ed.2d 298 (1974); *Klein* v. *American Luggage Works, Inc.*, 323 F.2d 787 (3d Cir. 1963). There was no evidence of any coercion on the part of Star Cooler to require adherence to the suggested resale price. The issuance of this recommendation cannot give rise to any inference of unlawful conduct or intent.

But plaintiffs can draw no comfort from the telephone conversation, either, assuming that the conversation is faithfully reproduced int he recording.[7] It is clear that Star Cooler had the right to select its own distributors and to do business with whomever it chose. *Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126, 133 (2d Cir.) (*en banc*), *cert. denied*, 439 U.S. 946, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978); *see also, Burdett Sound Inc.* v. *Altec Corporation*, 515 F.2d 1245, 1249 (5th Cir. 1975). Under the *Colgate* Doctrine, Star Cooler had the further right to terminate a distributor on a unilateral basis if it was dissatisfied with the distributor's pricing practices. *See United States* v. *Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919). But

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[7] As Mr. Voges admitted during his testimony at trial, there are several sounds on the tape that might reflect that the tape has been altered after it was recorded. Mr. Voges changed his testimony concerning the location of the tape recorder during the telephone call between the time he was deposed and the time he testified at trial because, he said, he learned at the deposition of defendants' expert on sound recordings that there were noises on the tape that indicated that it had been altered. Accordingly, Mr. Voges testified at trial that he might have "fiddled" with the tape recorder during the conversation and thus produced the sounds identified by defendants' expert. Naturally, for purposes of considering the motion for direct verdicts, the Court has given the plaintiffs the benefit of all favorable inferences from the record and has assumed that the tape recording is authenic.

this is not a *Colgate* case, because Star never made *any* suggestions to Roesch about the prices it should charge or how it should compete—except that Roesch was to sell only private label products.

The recording of the telephone conversation, taken in the light most favorable to the plaintiffs, shows only that Star Cooler had a concern that plaintiffs unauthorized efforts to sell Star-labeled products in direct competition with Star distributors who labored under materially higher operating costs imposed as a condition to qualify as a "stocking distributor", would give plaintiffs an unfair competitive advantage in the marketplace. There is no suggestion in the conversation that Star Cooler was acting pursuant to any conspiracy or that it had sought to require that Roesch maintain a fixed price for Star-built ice merchandisers. In the circumstances it is apparent that if Roesch were to have been permitted to continue its efforts to sell Star-built ice merchandisers as if they were Star-labeled units, but purchased the equipment at the substantially reduced price offered by Star to private label customers, it could undercut its competition with impunity. The recording shows Star Cooler's entirely proper concern with this situation. This conversation does not give rise to a permissible inference that Star Cooler and the other defendants were engaged in price-fixing and does not justify sending the case to the jury.

For all these reasons, the Court finds that plaintiffs have failed to sustain their burden of proof under Section 1 of the Sherman Act, and that verdicts should and hereby are directed to be entered in favor of defendants.

APPENDIX B

Roesch, Inc. and Marketing
Division, Inc.,
Appellants,

v.

Star Cooler Corporation, a
Missouri Corporation; Hussmann
Refrigeration, Inc.; and Tour Ice
Midwest, Inc.,
Appellees.

No. 81-1562.

United States Court of Appeals
Eighth Circuit.

Submitted Nov. 12, 1981.

Decided March 4, 1982.

Rehearing and Rehearing En Banc
Granted May 21, 1982.

William J. Travis, argued, St. Louis, Mo., for appellants; Greensfelder, Hemker, Wiese, Gale & Chappelow, St. Louis, Mo., of counsel.

Veryl L. Riddle, Thomas C. Walsh, John Michael Clear, argued, St. Louis, Mo., Byron A. Roche, Burton Halpern, Bridgeton, Mo., for appellees Star Cooler Corp., and Hussmann Refrigeration, Inc.; Bryan, Cave, McPheeters & McRoberts, St. Louis, Mo., of counsel.

Barry A. Short, Thomas M. Newmark, argued, Lewis, Rice, Tucker, Allen & Chubb, St. Louis, Mo., for appellee Tour Ice Midwest, Inc.

Before ROSS and STEPHENSON, Circuit Judges, and HOWARD,* District Judge.

STEPHENSON, Circuit Judge.

Plaintiff-appellants Roesch, Inc. (Roesch) and its wholly owned subsidiary, Marketing Division, Inc.,[1] appeal the district court's[2] entry of a directed verdict in favor of defendant-appellees Star Cooler Corporation (Star), Tour Ice Midwest, Inc. (Tour Ice)[3] and Hussmann Refrigeration, Inc. (Hussmann).[4] Roesch's complaint alleged that a conspiracy existed among the defendant-appellees to fix or maintain the resale price of ice merchandisers. Roesch argues that the court erred in directing the verdict because there was substantial evidence from which a jury could reasonably infer the existence of a contract, combination or conspiracy in violation of section 1 of the Sherman Act. We affirm the district court.

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* The Honorable George Howard, Jr., United States District Judge for the Eastern and Western Districts of Arkansas, sitting by designation.

[1] Appellants Roesch and Marketing Division, Inc. make the same arguments. Therefore, whenever reference is made to Roesch, such reference also includes its wholly owned subsidiary, Marketing Division, Inc.

[2] The Honorable H. Kenneth Wangelin, Chief Judge for the Eastern District of Missouri. The opinion is published at 514 F.Supp. 890 (E.D. Mo. 1981).

[3] Tour Ice is a distributor of Star ice merchandisers and a franchisee of Tour Ice National, a stocking distributor of Star ice merchandisers.

[4] Hussmann and Star are both wholly owned subsidiaries of Hussmann Refrigerator Company. Hussmann acts as a stocking distributor of Star products and competes with Star for the sale of ice merchandisers.

I. BACKGROUND

Star manufactures ice merchandisers, a refrigerated bin often found in grocery or convenience stores which holds and displays packaged ice. Roesch manufactures ice merchandisers and also sells two lines of ice merchandisers manufactured by Leer Manufacturing Company. In March of 1980, Roesch and Star verbally agreed that Roesch would sell a line of "private label" ice merchandisers purchased from Star. Private label refers to the fact that the merchandisers would undergo several changes so that they would resemble Roesch units and would not be identified as being a Star merchandiser. The Roesch name and design would appear on the merchandisers, the Roesch nameplate would be attached and Roesch bills of lading would be used in shipping the merchandisers that Star would manufacture for Roesch.

Roesch, as a private label customer, was given the lowest price on the merchandisers that Star made available to its customers. The only other category of Star customer who could purchase the merchandisers at that low price was Star's stocking distributors.[5] Roesch, unlike the stocking distributors, purchased only the ice merchandisers it had already sold through telephone solicitation of customers.

Roesch's telephone solicitation of customers began immediately after the private label arrangement was verbally agreed upon at a meeting between the representatives of the two companies. Roesch sold its private label, Star-built merchandisers as "Star Maid" ice merchandisers. Roesch charged a lower price than the manufacturer's recommended wholesale price.

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[5] Stocking distributors make an initial volume purchase of Star products and stock an inventory of Star products. They employ service personnel, maintain an inventory of spare and repair parts and honor warranty claims.

Star learned of Roesch's actions through two phone calls. A Hussmann salesman in Houston, Mr. Larocca called Mr. Smith of Star and Mr. Carpenter of Tour Ice called Mr. Duncan of Star. In these conversations the two distributors informed the Star employees of the sales and pricing practices of Roesch. In April of 1980, after approximately eleven days of selling Star-built products, Roesch was advised that its verbal agreement with Star was terminated.

On August 9, 1980, Roesch commenced this litigation. Roesch claimed that Star conspired with Tour Ice and Hussmann to terminate it as a part of a price-fixing scheme in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. After six days of trial to the jury, the district court ruled that Roesch had failed to present a prima facie case and directed verdicts for Star, Hussmann and Tour Ice. *Roesch, Inc.* v. *Star Cooler Corp.*, 514 F.Supp. 890 (E.D. Mo. 1981). The district court determined that Roesch had failed to prove a conspiracy between Star and any person or entity to terminate Star's agreement with Roesch. *Id.* at 893. Also, the court stated that Roesch failed to prove that any alleged conspiracy had the effect or was entered into with the intent of unreasonably restraining trade. *Id.* at 895.

II. ANALYSIS

[1,2] Roesch argues that summary procedures such as directed verdicts should be used sparingly in antitrust litigation. However, if an antitrust plaintiff does not present sufficient evidence in his case-in-chief to support a finding in his favor, a district court has a duty to direct a verdict in favor of the defendant. *Chisholm Brothers Farm Equipment Co.* v. *International Harvester Co.*, 498 F.2d 1137, 1139-40 (9th Cir.), *cert. denied*, 419 U.S. 1023, 95 S.Ct. 500, 42 L.Ed.2d 298 (1974). *See also Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911, 101 S.Ct. 1981, 68

L.Ed.2d 300 (1981) (upholding directed verdict against antitrust plaintiff); *Oreck Corp.* v. *Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980) (upholding directed verdict against antitrust plaintiff).[6]

When deciding whether a verdict should be directed, the evidence must be viewed by the court in the light most favorable to the non-moving party. Additionally, the non-moving party must be given the benefit of all legitimate inferences without assessing credibility. *Admiral Theatre Corp.* v. *Douglas Theatre Co.*, 585 F.2d 877, 883 (8th Cir. 1978). When the evidence thus viewed leaves no room for any reasonable difference of opinion as to the proper resolution of the case, then the court should resolve the case as a matter of law. *Id.* The district court's opinion in the instant case correctly described and applied the standards for directing a verdict.

[3,4] Price fixing, as alleged by Roesch, is a practice that is *per se* illegal under the Sherman Act. *See United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129 (1940); *Admiral Theatre Corp.* v. *Douglas Theatre Co., supra,* 585 F.2d at 890. However, to prove that Star, Tour Ice and Hussmann violated section 1 of the Sherman Act, Roesch had to prove that Star's decision to terminate the private label agreement was the product of a contract, combination or conspiracy. *See Admiral, supra,* 585 F.2d at 883. If Star's refusal to deal with Roesch was a unilateral or independent decision, such decision could have been based on Roesch's prices and still not violate section 1 since unilateral action does not violate section 1. *See Poller* v. *Columbia Broadcasting*

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[6] Directed verdicts are appropriate tools to end harassing treble damage suits where the alleged injury is merely a result of normal business hazards. *See Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 474, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962) (Harlan, J., dissenting); *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111 n.2 (3d Cir. 1980), *cert. denied,* 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981).

System, Inc., 368 U.S. 464, 468-69, 82 S.Ct. 486, 488-489, 7 L.Ed.2d 458 (1962); *United States* v. *Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919); *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, *supra*, 637 F.2d at 110; *Quality Mercury, Inc.* v. *Ford Motor Co.*, 542 F.2d 466, 469 (8th Cir. 1976). Star, as a manufacturer, has the prerogative of deciding with whom it will deal. *See Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126, 137 (2d Cir.) (en banc), *cert. denied*, 439 U.S. 946, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978).

[5] Roesch argues that a conspiracy can be inferred from the evidence that both Tour Ice and Hussmann employees called Star and complained about the low prices Roesch was offering customers. The evidence reveals that after customers of Mr. Carpenter of Tour Ice called him and told him Roesch was quoting low prices for Star merchandise, he called Mr. Duncan to determine whether he was receiving the lowest price from Star. Mr. Carpenter understood that he was supposed to be getting the best price that Star offered. Mr. Carpenter testified that he did not request that any action be taken against Roesch.

The second telephone call relied upon by Roesch is the one made by Mr. Larocca of Hussmann to Mr. Smith of Star. Mr. Larocca told Mr. Smith that Roesch had approached previous customers of Hussmann and offered them Star merchandise at a low price. Mr. Larocca wanted to know what was going on. Mr. Smith told Mr. Larocca that Roesch was apparently not living up to its agreement but that Star could not do anything about the price at which Roesch sold the product. Mr. Smith testified that this call did not involve any request to terminate Roesch.

[6] Although there is limited authority to the contrary, *see Girardi* v. *Gates Rubber Co. Sales Division*, 325 F.2d 196 (9th Cir. 1963), the majority view, which we adopt, is that mere complaints by customers of a manufacturer that distributors and dealers engage in price-cutting are not enough to imply a conspiracy in violation of section 1. Such complaints arise in the

normal course of business and do not indicate illegal concerted action. *See Oreck Corp.* v. *Whirlpool Corp., supra,* 639 F.2d at 80; *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc., supra,* 637 F.2d at 111; *Borger* v. *Yamaha International Corp.,* 625 F.2d 390, 395 (2d Cir. 1980); *Oreck Corp.* v. *Whirlpool Corp., supra,* 579 F.2d at 133; *Westinghouse Electric Corp.* v. *CX Processing Laboratories, Inc.,* 523 F.2d 668, 675 (9th Cir. 1975); *Carr Electronics Corp.* v. *Sony Corp. of America,* 472 F.Supp. 9, 13 (N.D.Cal. 1979); *Interphoto Corp.* v. *Minolta Corp.,* 295 F.Supp. 711, 719 n.3 (S.D.N.Y. 1969), *aff'd per curiam,* 417 F.2d 621 (2d Cir. 1969); *Carbon Steel Products Corp.* v. *Alan Wood Steel Co.,* 289 F.Supp. 584, 588 (S.D.N.Y. 1968). Therefore, assuming the phone calls to Star can be considered complaints, such calls do not imply the conspiracy which Roesch is required to prove to establish a prima facie case.

[7] Roesch also argues that Star's recommendation to its distributors to charge at a certain price evidences a price-fixing conspiracy. However, such recommendations by Star are lawful and do not trigger an inference of illegal activity unless there is additional evidence of retail price monitoring or evidence of pressure and coercion to secure adherence to the suggested price. *See Chisholm Brothers Farm Equipment Co.* v. *International Harvester Co., supra,* 498 F.2d at 1142-43; *Klein* v. *American Luggage Works, Inc.,* 323 F.2d 787, 791 (3d Cir. 1963). Since the record is devoid of any such additional evidence, Star's mere stating of a suggested resale price does not in itself infer a conspiracy.[1]

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1 [1] Roesch argues that a phone call from Mr. Rehder of Star to Debra Voges of Roesch was an implied threat of termination because of Roesch's underselling. However, we do not view it as such since Ms. Voges testified that Mr. Rehder suggested Roesch sell at the recommended retail price and that Mr. Rehder did not make any threats to terminate Roesch if it did not sell at the suggested price.

[8] The record does not contain sufficient evidence to warrant an inference of a conspiracy among the defendants. The jury should be "permitted to draw only those inferences of which the evidence is reasonably susceptible, and may not be permitted to resort to speculation." *Admiral Theatre Corp.* v. *Douglas Theatre Co., supra,* 585 F.2d at 883 (quoting *Viking Theatre Corp.* v. *Paramount Film Distributing Corp.*, 320 F.2d 285, 296 (3d Cir. 1963), *aff'd by an equally divided court,* 378 U.S. 123, 84 S.Ct. 1657, 12 L.Ed.2d 743 (1964)). The district court correctly prevented the jury from speculating on the existence of a conspiracy on the basis of such meager evidence.[4]

[9] We have examined Roesch's other arguments regarding the exclusion of written contracts[5] and internal Star memorandum, settlement testimony and voir dire. These arguments have no merit. We affirm the district court.

Affirmed.

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[4] Roesch also argues that evidence of a conspiracy can be found in the taped phone conversation between Mr. Voges of Roesch and Mr. Smith of Star. However, a review of the content of that call reveals no reference to any other distributor or to any agreement between Star and its other distributors. Therefore, the call does not offer any evidence to support Roesch's allegation of a conspiracy among the defendants.

[5] The district court did not abuse its discretion in refusing to admit into evidence dealer agreements concerning minimum prices which were entered into by prior Star management and were cancelled immediately following acquisition of Star by Hussmann in 1978. Roesch's complaint charges illegal activity commencing in the summer of 1979.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1562

September Term, 1981

Roesch, Inc. and Marketing Division,
Inc.,
Appellants,

vs.

Star Cooler Corporation, a Missouri
corporation; Hussmann Refrigeration,
Inc.; and Tour Ice Midwest, Inc.,
Appellees.

Appeal from the United
States District Court
for the Eastern District
of Missouri.

The Court, having considered the appellants' petition for rehearing en banc and the appellees' joint response, hereby grants the appellants' petition for rehearing en banc.

May 21, 1982

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1562

Appeal from the United
States District Court
for the Eastern District
of Missouri

Roesch, Inc. and Marketing
Division, Inc.,
Appellants,

v.

Star Cooler Corporation, a
Missouri corporation; Hussmann
Refrigeration, Inc.; and Tour
Ice Midwest, Inc.,
Appellees.

Submitted: March 14, 1983

Filed: July 12, 1983

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, and FAGG, Circuit Judges, *en banc*.

ROSS, Circuit Judge.

Roesch brought this action alleging that defendants, Star Cooler, Hussmann and Tour Ice, violated section one of the Sherman Act. The district court[1] directed a verdict in favor of defendants finding insufficient evidence of an antitrust conspiracy. *Roesch, Inc.* v. *Star Cooler Corp.*, 514 F.Supp. 890 (E.D. Mo. 1981). A panel of this court affirmed the district court's judgment on appeal. *Roesch, Inc.* v. *Star Cooler Corp.*, 671 F.2d 1168 (8th Cir. 1982). On that same day a separate panel filed an opinion in *Battle* v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982) which reached a result contrary to that in the present case. We accordingly granted rehearing *en banc* in both *Roesch* and *Battle*. On October 1, 1982, while the cases were under consideration by the court *en banc*, Judge George G. Fagg was appointed to succeed Judge Roy L. Stephenson, who assumed senior status on April 1, 1982. Judge Stephenson died on November 5, 1982. Because of the possibility of reaching inconsistent results in *Roesch* and *Battle* the court decided to resubmit both cases *en banc*, on the briefs, with Judge Fagg voting on both cases. Thus, the cases were resubmitted to the new *en banc* court without oral argument.

The judgment of the district court in this case is affirmed by an equally divided court upon rehearing *en banc*. The judgment, accordingly, is without precedential value and "the usual practice is not to express any opinion, for such expression is unnecessary where nothing is settled." *Ohio* v. *Price*, 364 U.S. 263, 264, 80 S.Ct. 1463, 1464 (1960). *See, e.g., Fair Assessment in Real Estate Assoc., Inc.* v. *McNary*, 622 F.2d 415 (8th Cir. 1980), *aff'd*, 454 U.S. 100 (1981). In the present case, however, because of the significance of the issue involved and the circumstances of the changed *en banc* panel, we elect to set forth

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[1] The Honorable H. Kenneth Wangelin, Chief Judge for the Eastern District of Missouri.

our reasons for affirming the district court's judgment. We affirm essentially for the reasons discussed in the panel opinion.[2] *Roesch, Inc.* v. *Star Cooler Corp., supra,* 671 F.2d 1168. We file this opinion as additional support for our position.

Initially, we note that a directed verdict for defendant is appropriate in an antitrust case where plaintiff fails to make a prima facie showing of a section one violation. *Oreck Corp.* v. *Whirlpool Corp.,* 639 F.2d 75, 78 (2d Cir. 1980), *cert. denied,* 454 U.S. 1083 (1981); *Edward J. Sweeney & Sons, Inc.* v. *Texaco,* 637 F.2d 105, 115 (3d Cir. 1980), *cert. denied,* 451 U.S. 911 (1981); *Chisholm Bros. Farm Equip. Co.,* 498 F.2d 1137, 1139-40 (9th Cir.), *cert. denied,* 419 U.S. 1023 (1974). In reviewing a grant or denial of a motion for directed verdict this court must view the evidence in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences without assessing the credibility of witnesses. However, it is well settled that the jury

> "is permitted to draw only those inferences of which the evidence is reasonably susceptible, and may not be permitted to resort to speculation." *Viking Theatre Corp.* v. *Paramount Film Distrib. Corp.,* 320 F.2d 285, 296 (3d Cir. 1963), *aff'd by an equally divided court,* 378 U.S. 123, 84 S.Ct. 1657, 12 L.Ed.2d 743 (1964); see *Twin City Plaza, Inc.* v. *Central Sur. & Ins. Corp.,* 409 F.2d 1195, 1202-03 n.8 (8th Cir. 1969). When the evidence is so one-sided as to leave no room for any reasonable difference of opinion as to how the case should be decided, it should be decided by the court as a matter of law rather than submitted to a jury for its determination. *Kennedy* v. *U.S. Construction Co.,* 545 F.2d 81, 82 (8th Cir. 1976); *Gillette Dairy, Inc.* v. *Hydrotex Inds., Inc.,* 440 F.2d 969, 971 (8th Cir. 1971).

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[2] The factual background of this case is set out in the district court and panel opinions and will not be repeated here.

Admiral Theatre Corp. v. *Douglas Theatre Co.*, 585 F.2d 877, 883 (8th Cir. 1978).

Section one, by its terms, requires proof of an agreement, conspiracy or combination in restraint of trade. 15 U.S.C. § 1. To establish the existence of such a conspiracy, Roesch was required to submit evidence from which a jury could have reasonably inferred that Star Cooler's decision to terminate Roesch was the direct result of a conscious commitment by defendants to a common scheme. *Edward J. Sweeney & Sons, Inc.* v. *Texaco, supra,* 637 F.2d at 111. Thus, a *per se* violation of section one would be established by proof that Star Cooler terminated its relationship with Roesch at the request of competing distributors and that the termination was in pursuit of a price related end. *Contractor Utility Sales Co.* v. *Certain-Teed Products Corp.*, 638 F.2d 1061, 1072 n.9 (7th Cir. 1981); *Alloy Int'l Co.* v. *Hoover-NSK Bearing Co.*, 635 F.2d 1222, 1225 (7th Cir. 1980); *Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164, 170 (3d Cir. 1979). The district court held that there was no evidence of any conspiracy or concerted action between Star Cooler and any other person and further, that Roesch failed to prove that the alleged conspiracy "had the effect or was entered into with the intent of unreasonably restraining trade." *Roesch, Inc.* v. *Star Cooler Corp., supra,* 514 F.Supp. at 893 and 895.

Roesch argues that the evidence demonstrates that employees of Tour Ice and Hussmann complained to Star Cooler about the low prices Roesch was quoting customers. Roesch maintains that his termination following the distributors' complaints presents strong circumstantial evidence of a section one violation.[3] A careful examination of the evidence reveals only that an

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[3] Roesch relies on the Ninth Circuit decision in *Girardi* v. *Gates Rubber Company Sales Division, Inc.*, 325 F.2d 196 (9th Cir. 1963) in which that court found a section one conspiracy where one distributor was terminated following complaints by competing distributors. We agree with the district court's discussion of *Girardi* and its conclusion that "[t]his case has been often distinquished and is of questionable authority, and in any event is easily distinguished from the present case." *Roesch, Inc.* v. *Star Cooler Corp.*, 514 F.Supp. 890, 894 and n.5 (E.D. Mo. 1981).

employee of Tour Ice telephoned Star Cooler to ask whether Tour Ice was receiving the best price and that an employee of Hussmann called Star Cooler to determine why Roesch was quoting such low prices. Neither of the phone calls involved requests to terminate Roesch or threats of any other action. The evidence on the record is insufficient to prove that the phone calls constituted a conspiracy. The distributors' complaints were for the purpose of determining whether Star Cooler was treating its distributors fairly. Such complaints are not *per se* unlawful. *Westinghouse Elec.* v. *CX Processing Labs.*, 523 F.2d 668, 676 (9th Cir. 1975).

As the Second Circuit has held, it is not unlawful for a manufacturer to consult with its dealers and "those consultations, standing alone, would not establish the existence of a combination or agreement under the Sherman Act." *Borger* v. *Yamaha Int'l Corp.*, 625 F.2d 390, 395 (2d Cir. 1980). Moreover, complaints of one distributor about the selling practices of another do not "indicate illegal concerted action, since it is merely normal marketplace behavior for such complaints to be made." *Oreck Corp.* v. *Whirlpool Corp., supra,* 639 F.2d at 80. Our reading of the record reveals only that employees of Tour Ice and Hussman called Star Cooler to inquire about the fairness with which Star Cooler treated its distributors. We are hardpressed to call these conversations "complaints." However, even if the phone calls are characterized as distributors' complaints, they do not rise to the level of illegal concerted action.

We conclude that Roesch presented insufficient evidence of a section one violation and thus the directed verdict for defendants is affirmed. The additional issues raised by Roesch were adequately discussed in the district court's memorandum. Based on this court's disposition of this case, we see no need to address those issues here.

The district court's judgment is affirmed by an equally divided court. Judges Bright, John R. Gibson and Fagg join in this opinion.

McMILLIAN, Circuit Judge, dissenting, with whom LAY, Chief Judge, HEANEY and ARNOLD, Circuit Judges, join.

I respectfully dissent for the reasons discussed in my dissenting opinion in the companion case decided today, *Battle* v. *Lubrizol Corp.*, No. 81-1585.

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EIGHTH CIRCUIT.

DISSENTING OPINION ISSUED IN *BATTLE* V. *LUBRIZOL CORP.*, SLIP OP. NO. 81-1585 (8TH CIR. *EN BANC* 1983).

McMILLIAN, Circuit Judge, dissenting, with whom LAY, Chief Judge, HEANEY and ARNOLD, Circuit Judges, join.

I respectfully dissent. My reasons for dissenting from the court's decision affirming, by an equally divided vote, the judgment of the district court are essentially set forth in my majority opinion for the panel, *Battle* v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982). In light of the en banc opinions in this case and its companion case, *Roesch, Inc.* v. *Star Cooler Corp.*, No. 81-1562, I add the following comments.

The essential facts in each case are not distinguishable; however, I disagree with the synopsis set forth in the *Battle* en banc opinion, slip op. at 3: "a competing distributor complained to the manufacturer but received a neutral response; and

later, the manufacturer made a unilateral decision to terminate the plaintiffs." This statement of facts would preclude a finding of an antitrust violation. I would modify the above statement of facts by adding that the distributor's complaints to the manufacturer were price-related and by deleting the reference to the manufacturer's *unilateral* decision to terminate the distributor. If one assumes that the manufacturer's decision to terminate was unilateral, then such a decision would have been lawful regardless of the manufacturer's concern with price. *E.g., United States* v. *Colgate,* 250 U.S. 300 (1919). Whether or not the manufacturer did act unilaterally is at issue in these cases. I would therefore rephrase the essential facts as follows: a competing distributor made price-related complaints about another distributor to the manufacturer; later, the manufacturer terminated the plaintiffs.[1]

I agree that the mere receipt of complaints, even price-related complaints by a manufacturer, from one or more distributors about the selling practices of another distributor do not "indicate illegal concerted action, [because] it is merely normal marketplace behavior for such complaints to be made." *Roesch,* slip op. at 5, *citing Oreck Corp.* v. *Whirlpool Corp.,* 639 F.2d 75, 80 (2d Cir. 1980), *cert. denied,* 454 U.lS. 1083 (1981). *See Battle* v. *Lubrizol Corp.,* 673 F.2d at 991, *citing Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.,* 637 F.2d 105, 111 (3d Cir. 1980) (*Sweeney*), *cert. denied,* 451 U.S. 911 (1981).

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[1] This issue is now pending before the Supreme Court in *Monsanto Co.* v. *Spray-Rite Service Corp.,* 684 F.2d 1226, 1238-39 & n.7 (7th Cir. 1982) (citing the panel opinion in *Battle*), *cert. granted,* 103 S.Ct. 1249 (1983). One of the questions presented in the petition for certiorari is whether a *per se* unlawful vertical price-fixing conspiracy can be inferred solely from evidence that the manufacturer, concerned about resale prices, received price complaints from the distributor's competitors and later did not renew the distributor's contract. 51 U.S.L.W. 3627 (Mar. 1, 1983).

I also agree, with minor modifications, with the definition of a *per se* violation set forth in *Roesch*, slip op. at 3-4: "a *per se* violation of section one would be established by proof that [the manufacturer] terminated its relationship with [the distributor] at the request of [another] competing [distributor or] distributors and that the termination was in pursuit of a price-related end." *See Battle* v. *Lubrizol Corp.*, 673 F.2d at 990, *citing Contractor Utility Sales Co.* v. *Certain-Teed Products Corp.*, 638 F.2d 1061, 1072 & n.9 (7th Cir. 1981), *Alloy International Co.* v. *Hoover-NSK Bearing Co.*, 635 F.2d 1222, 1224 (7th Cir. 1980) (single dealer), and *Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164, 170 (3d Cir. 1979) (single dealer). *See also Spray-Rite Service Corp.* v. *Monsanto Co.*, 684 F.2d 1226, 1234 (7th Cir. 1982) (*Spray-Rite*), *cert. granted*, 103 S.Ct. 1249 (1983).

Moreover, I also agree with the statement that "a manufacturer's termination after receiving complaints cannot be characterized in and of itself as responsive action permitting an inference of concerted action." *Battle*, slip op. at 3; *Roesch*, slip op. at 4. Merely showing that the manufacturer terminated the distributor following receipt of complaints establishes only a sequential relationship; it does not establish a causal relationship between the two events. The relationship between the complaints and the termination is necessarily sequential because the terminated distributor could not complain if the termination *preceded* the receipt of complaints by the manufacturer; in that event there could be no casual relationship between the two events at all. However, the inference of concerted action is not based upon the sequential relationship between the complaints and termination but upon the causal relationship between the two events, which is established by showing that the termination was *in response* to the complaints. *Compare Sweeney*, 637 F.2d at 116 (distinguishing sequence from consequence), *with id.* at 124-25 (Sloviter, J., dissenting) (emphasizing that "the mere fact that the manufacturer/supplier took some action will not

suffice to establish the requisite combination unless such action were taken in response to such complaints"). Thus, I continue to be of the opinion that "proof of a dealer's complaints to the manufacturer about a competitor dealer's price-cutting, and the manufacturer's action [, that is, the termination of the misbehaving dealer,] *in response* to such complaints would be sufficient to raise an inference of concerted action." *Battle* v. *Lubrizol Corp.*, 673 F.2d at 991 (emphasis in original), *citing Sweeney*, 637 F.2d at 124-25 (Sloviter, J., dissenting); *see also Spray-Rite*, 684 F.2d at 1239.

I would argue that plaintiffs introduced sufficient evidence from which the jury could find that the manufacturer acted in response to the complaints and from that finding draw an inference of concerted action. Admittedly, the evidence of responsive action is circumstantial. However, it is unlikely that plaintiff would have or been able to discover any direct evidence that the manufacturer, in fact, acted in response to the complaints, or that the manufacturer told the complaining distributors that it would do so. That the manufacturer acted in response to the complaints of its distributors in terminating plaintiffs is not the only reasonable inference that can be drawn from the evidence. It would be equally permissible to infer that, as the manufacturer argued, plaintiffs were terminated because they violated their marketing agreement or were dishonest, or that the manufacturer terminated plaintiffs for price-related reasons but decided to do so unilaterally and independently of the complaints. It is a matter for the jury to decide which explanation of the manufacturer's action is more plausible, particularly when the determination depends heavily upon the credibility of the witnesses.

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CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1562.

September Term, 1982

Roesch, Inc. and Marketing Division,
Inc.,
Appellants,

vs.

Star Cooler Corporation, etc., et al.,
Appellees.

Appeal from the United States
District Court for the Eastern
District of Missouri.

On motion of appellees, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

August 12, 1983